

LEGAL REVIEW NOTE

LC#: LC0882, To Legal Review Copy, as of
February 12, 2013

Short Title: Referendum requiring parental consent
for an abortion for a minor

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CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

Legal Reviewer Comments:

LC0882, as drafted, may raise potential constitutional issues concerning Montana's constitutional guarantees of equal protection, Article II, section 4, and the right of privacy, Article II, section 10.

Article II, section 4, of the Montana Constitution provides that "[n]o person shall be denied the equal protection of the laws." Unlike the United States Constitution, which does not provide an explicit right of privacy, Article II, section 10, of the Montana Constitution expressly provides:

The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

The Montana Supreme Court has observed that Montana's right of privacy is one of the most stringent protections of the right of privacy in the United States and is more strict than the right of privacy afforded under the United States Constitution. *St. v. Burns*, 253 Mont. 37, 40, 830 P.2d 1318, 1320 (1992).

Article II, section 15, of the Montana Constitution guarantees this same right of privacy to minors:

The rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons.

LC0882 requires that before a minor can have an abortion, the minor must obtain parental consent from a parent or legal guardian by either obtaining the notarized written consent of a parent or legal guardian, obtaining a judicial waiver, or obtaining a notarized waiver from a parent or legal guardian. LC0882 requires the Department of Public Health and Human Services to create a consent form for use in obtaining notarized parental consent. The form includes a detailed list of disclosures related to the risk and hazards associated with the planned abortion procedures that a minor is required to individually initial.

Because the right of privacy is a fundamental right, legislation that infringes on the exercise of the right of privacy must be justified by a compelling state interest and must be narrowly tailored to effectuate only that compelling interest. *Armstrong v. St.*, 296 Mont. 361, 989 P.2d 364 (1999). Similarly, courts in Montana apply a strict scrutiny test when reviewing legislation for equal protection issues if the legislation impacts a fundamental right. *St. v. Davison*, 314 Mont. 427, 67 P.3d 203 (2003).

In *Armstrong v. St.*, the Montana Supreme Court struck down the "physician only" provisions of the Montana Abortion Control Act, Title 50, chapter 20, MCA, holding that the procreative autonomy component of personal autonomy is protected by Montana's right of privacy, which "broadly guarantees each individual the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from interference of the government". *Armstrong*, ¶ 75. Following *Armstrong*, the First Judicial District Court declared that portions of the Montana Abortion Control Act involving informed consent and a woman's right to know were unconstitutional under Article II, section 10, of the Montana Constitution and permanently enjoined those provisions. *Planned Parenthood of Missoula v. St.*, No. BDV 95-722, First Judicial District Court Lewis and Clark County (Dec. 29, 1999). Similarly, in *Wicklund v. St.*, the First Judicial District Court determined that the parental notice provisions of the Montana Abortion Control Act infringed upon, rather than enhanced, the rights of pregnant minors and that no compelling rationale existed for restrictive abortion legislation on minors. The *Wicklund* Court further determined that parental notification provisions violated the Montana Constitution's guarantee of equal protection under the law because the provisions created unequal and unfair application to pregnant minors who wanted to terminate their pregnancies versus pregnant minors who did not wish to do so. *Wicklund v. St.*, No. ADV 97-671, First Judicial District Court, Lewis and Clark County (Feb. 25, 1999).

In light of the foregoing precedent, LC0882, as drafted, may raise a constitutional conformity issue regarding the infringement upon a minor's right to privacy, specifically the right to procreative autonomy. In addition, a potential constitutional conformity issue may exist regarding whether the parental consent requirement applies unequally and unfairly to minors who

wish to terminate their pregnancies.

Requester Comments: See attached

SPONSOR'S COMMENTS IN RESPONSE TO THE LEGAL REVIEW

LC#: 0082

Short Title: Generally revise laws related to health and safety.

Date: 2/14/13

While the Judicial branch looks to statutes, the Constitution, and case law when making decisions, the Legislative branch, the branch closest to the people, looks to the people themselves.

Opponents of Legislative Referendum 120 (LR-120), the recently passed ballot referendum requiring children under 16 to notify at least one parent before having an abortion, used the same arguments as those above in the 2011 legislative session. They were ignored by the voters, and LR-120 was passed in November 2012 by 71% to 29%.

The overarching principle is that the will of the people should never be held subservient to their own Constitution. While the Constitution was ratified by 50.5%, LR-120 was "ratified" by 71%. The intent of the people is clear.

With regard to *Wicklund v. St.* and the broad interpretation of the Constitution's privacy clause in *Armstrong v. St.*, there exists 2 possibilities: 1) The court interpreted the Constitution correctly, in which case it must be amended to comport with the people's wishes as expressed in the vote on LR-120, or 2) The more likely case; the Supreme Court's broad interpretation of the privacy clause in *Armstrong* went beyond the wishes of the people, especially as it was then coupled with Article II, section 15 and applied to the rights of minors in the *Wicklund* case. Either way, 71% of the electorate, in a direct vote of the people, agreed with the "Legislative findings" and the "compelling interest" statements embedded in LR-120.

It is important to remember that courts can and do make mistakes. No one believes that *Dred Scott* was correctly decided, and more recently, many opponents of this bill decry the U.S. Supreme Court's holdings in the landmark *Citizens United* case. Montana case law notwithstanding, it is clearly the desire of the vast majority of Montanans that parents be allowed to be involved in decisions regarding their children's healthcare, regardless of the medical procedure. It is also important to remember that the discussion surrounding the right to privacy at the Constitutional Convention focused on electronic eavesdropping by the government on its citizens.

Regarding parental involvement in medical procedures affecting their children, the people have spoken, government should be required to show a compelling state interest before placing itself squarely between parents and their children.

